(1)

Supreme Court, U.S.
FILED

No. 95-586 OCT 10 1995

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

STATE OF WISCONSIN,
et al.

Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.

Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
Wisconsin Department of Justice
123 West Washington Avenue
Madison, Wisconsin 53707-7857
(608) 267-2796

43pp

QUESTION PRESENTED

The "salary basis test" is used by the United States Department of Labor (USDOL) to define executive, administrative and professional exemptions to the federal overtime compensation law. Its rationale was last examined long before that law was extended to public employers in 1966 and 1974. Responding, in 1992, to public sector concerns over part of that test, USDOL acknowledged it had both thwarted express congressional intent and breached public accountability principles and altered how that part of the test applies to public employers. The court of appeals presumed another part of that test untouched by USDOL in 1992, the disciplinary deduction standard, had validly construed congressional intent. Under that standard, a State must pay overtime compensation to all of its executives and professionals, even though a State may never actually make a prohibited disciplinary deduction, if it reserves any right to suspend those employes except as prescribed by USDOL. The question presented is:

> Should courts conclude Congress intended, under its commerce power, to require States to impose discipline contrary to public accountability standards when accepted statutory construction rules establish Congress never intended that result?

LIST OF PARTIES

The parties to the trial court proceedings below were as follows: the petitioners, the State of Wisconsin, the Wisconsin Department of Transportation, and its Secretary, Charles H. Thompson, the Wisconsin Department of Administration, and its Secretary, James R. Klauser, the Wisconsin Department of Natural Resources, and its Secretary, George Meyer, the Wisconsin Department of Health and Human Services, and its Secretary, Gerald Whitburn, the Wisconsin Department of Industry, Labor and Human Relations, and its Secretary, Carol Skornicka, the Board of Regents of the University of Wisconsin, and its President, George K. Steil, Sr., the Wisconsin Department of Employment Relations, and its Secretary, Jon E. Litscher (the State defendants); the respondents, the United States Department of Labor and its Secretary, Robert Reich (USDOL); and the respondents, Gerald R. Mueller, James A. Andreshak, Frederick Moeller, David Tamblyn, David Dahlk, Melvin Sensenbrenner, Richard Nelson, Roger Bohn, David Buschkopf, Curtis Paulson, Thomas M. Stemrich, Terry D. Cook, Gerard Swim, Robert Grosch, and Vernon Carlson, the State Engineering Association, the named plaintiffs and hundreds of unnamed plaintiffs who consented to be plaintiffs (the Engineers). The named and unnamed plaintiffs are listed in the Appendix at App. 42-45.

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

B. History of the FLSA, Exemptions, Salary Basis Requirement, Salary Basis Test and Disciplinary Deduction Standard 5

REASONS FOR GRANTING THE WRIT 9

Congress never intended to exercise its commerce power to require States to impose discipline on their employes contrary to public accountability standards. 9

A. The court of appeals decision undermines the federal-state balance by presuming that an outdated agency interpretation expresses subsequent congressional intent 9

B. All accepted rules of statutory construction run against concluding that Congress intended to undermine the federal-state balance by applying the disciplinary deduction standard to public employers 13

Page

C. **The decision undermines the federal-state balance by improperly deferring to a non-regulatory interpretation as if it were a regulation** 15

D. **Congressional intent toward disciplining public employes appears from how it treats federal employes.** 17

E. **The disciplinary deduction standard undermines the federal-state balance by depriving States of the vital tool of progressive discipline in ways that implicate constitutional rights.** 18

F. **The power to control official misconduct through pay is a vital component of sovereignty** 20

G. **Had Congress intended the disciplinary deduction standard to apply to State employers it would have exceeded its constitutional boundaries** 24

CASES CITED

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990) 16

Bankston v. State of Illinois,
60 F.3d 1249 (7th Cir. 1995) 5, 13

Page

Black v. Barnett,
999 F.2d 1295 (7th Cir. 1993) 19

Brock v. Claridge Hotel and Casino,
846 F.2d 180 (3rd Cir. 1988) 6

Chevron U.S.A., Inc. v. Natural Resources
Defense Council, Inc., 467 U.S. 837 (1984) .. 15, 16

Craig v. Far West Engineering Co.,
265 F.2d 251 (9th Cir. 1959) 6

Crowley v. United States,
527 F.2d 1176 (Ct. Claims 1975) 18

Edward J. DeBartolo Corp. v. Fla. Gulf Coast
Tr. Coun.,485 U.S. 568 (1988) 28

Fleming v. County of Kane,
898 F.2d 553 (7th Cir. 1990) 19

Freytag v. C.I.R., 501 U.S. 868 21

Garcia v. San Antonio Metropolitan Transit
Authority, 469 U.S. 528 (1985) 6, 8, 13, 25

Garraghty v. Jordan,
830 F.2d 1295 (4th Cir. 1987) 26

Gellerman v. Nimmo,
704 F.2d 1004 (7th Cir. 1983) 18

Glass v. Dachel,
2 F.3d 733 (7th Cir. 1993) 19

Page

Gregory v. Ashcroft,
501 U.S. ___, 115 L.Ed.2d 410 (1991) 25

Highland Farm Dairy v. Agnew,
300 U.S. 608 (1937) 26

John Hancock Mutual Life Insurance Co. v.
Harris Trust & Savings Bank,
114 S. Ct. 517 (1993) 16

Klein v. Rush-Presbyterian-St. Lukes Medical Center,
990 F.2d 279 (7th Cir. 1993) 15

Lee v. County of Cook,
862 F.2d 139 (7th Cir. 1988) 19

Maryland v. Wirtz,
392 U.S. 183 (1968) 6, 8, 13

Minor v. Happersett,
88 U.S. 162 (1875) 27

Moreau v. Klevenhagen,
508 U.S. ___, 113 S.Ct. 1905 (1993) 6, 8

National League of Cities v. Brennan,
419 U.S. 1321 (1974) 8

National League of Cities v. Usery,
426 U.S. 833 (1976) 6, 8, 13

New York v. United States,
505 U.S. ___, 112 S.Ct. 2408 (1992) 13, 25-27

Page

NLRB v. Chicago Typographical Union No. 16, Communications Workers of America, AFL-CIO, 974 F.2d 933 (7th Cir. 1992) 18, 29

Pascal v. United States, 543 F.2d 1284 (Ct. Claims 1976) 18

Paulitz v. City of Naperville, 781 F.Supp. 1368 (N.D.Ill. 1992) 13

Personnel Administrator v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) 19

Reich v. New York, 3 F.3d 581 (2nd Cir. 1993), *cert. denied*, 114 S. Ct. 1187 (1994) 15

Reich v. Newspapers of New England, Inc., 44 F.3d 1060 (1st Cir. 1995) 15

Rizzo v. Goode, 423 U.S. 362 (1976) 26

Roney v. United States, 790 F. Supp. 23 (D.D.C. 1992) 14

Service Employees Int'l Union, Local 102 v. County of San Diego, 35 F.3d 483, (9th Cir. 1994), *amended and superceded on denial of rehearing*, 60 F.3d 1346, (9th Cir. 1995) 10, 15

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 15

Page

Stewart v. City and County of San Francisco,
834 F.Supp. 1233 (N.D.Cal. 1993) 11

Tennes v. Dep't of Revenue,
944 F.2d 372 (7th Cir. 1991) 19

Tripp v. May,
189 F.2d 198 (7th Cir. 1951) 16

U.S. Term Limits v. Thornton,
514 U.S. ___, 115 S.Ct. 1842 (1995) 25

United States v. Lopez,
514 U.S. ___, 131 L.Ed.2d 626 (1995) 25

Warren v. Stone,
958 F.2d 1419 (7th Cir. 1992) 19

CONSTITUTIONAL PROVISIONS

Article I, Section 8, clause 3 (App. 46)
. . . . . 2, 17, 24, 25, 26, 28,

Article IV, Section 4 (App. 46) 2, 24, 25, 26, 27, 28,

Article X of the Amendments (App. 46)
. . . . . 2, 24, 25, 26, 27, 28,

Article XIV, Section 1 of the Amendments (App. 46)
. . . . . 2, 11, 19

UNITED STATES STATUTES

5 U.S.C. Part 3, Ch. 75 (1966) (App. 50) 2, 17

Page

5 U.S.C. Part 3, Ch. 75 (1978) (App. 46) 2, 17

28 U.S.C. § 1254(1) 2

28 U.S.C. §§ 1251(b)(2) 2

29 U.S.C. § 201 et seq. 3

29 U.S.C. § 203 (App. 51) 2, 12

29 U.S.C. § 207 (App. 51) 2, 3

29 U.S.C. § 213(a) (App. 52) 2, 3, 5, 6, 8, 9

UNITED STATES REGULATIONS

5 C.F.R. Part 551, Subpart B (App. 52) 2, 7

29 C.F.R. § 541.1 (App. 56) 2, 6

29 C.F.R. § 541.2 (App. 57) 2, 6

29 C.F.R. § 541.3 (App. 58) 2, 6

29 C.F.R. § 541.5d (1991) (App. 60) 2, 8

29 C.F.R. § 541.5d (1992) (App. 59) 2, 8

WISCONSIN STATUTES

Sec. 15.001 (App. 60) 2, 28

16.415 (App. 61) 2, 28

16.53 (App. 62) 2, 28

20.923 (App. 63) 2, 28

36.09 12

111.90 (App. 63) 2, 28

111.91 (App. 64) 2, 28

230.01 (App. 64) 2, 28

230.34 (App. 65) 2, 28

230.44 (App. 65) 2, 28

SUPREME COURT RULES

14.1(i)(vi) 3

OTHER AUTHORITIES

29 C.F.R. § 541.118 (App. 66) 3, 6, 7, 15, 16

29 C.F.R. § 541.314 (App. 70) 3, 12

3 Fed. Reg. 2518 (October 20, 1938) (App. 70) 6, 12

5 Fed. Reg. 4077-4078 (October 15, 1940) (App. 71) 6

19 Fed. Reg. 1321-1322 (March 9, 1954) (App. 72) . . . 6, 7

19 Fed. Reg. 4405-4406 (July 17, 1954) (App. 73) 6, 7

33 Fed. Reg. 12491 to 12494 (September 4, 1966) (App. 73) 17

Page

38 Fed. Reg. 11390 and 11392 (May 7, 1973) (App. 75) . 6

39 Fed. Reg. 33255 (September 16, 1974) (App. 76) 7

40 Fed. Reg. 27640 to 27641 (July 1, 1975) (App. 77) ... 7

44 Fed. Reg. 3440, 3444-3445 (January 16, 1979) (App. 82) 17

48 Fed. Reg. 49494 (October 25, 1983) (App. 82) 7

50 Fed. Reg. 47696-47997 (November 19, 1985) (App. 83) 8, 10

51 Fed. Reg. 2525 (January 17, 1986) (App. 84) 8

51 Fed. Reg. 7425 (March 4, 1986) (App. 85) 7

52 Fed. Reg. 2102, 2109, 2023 (January 16, 1987) (App.. 85) 8, 10

56 Fed. Reg. 45824 (September 6, 1991) (App. 86) .. 8, 10

57 Fed. Reg. 37666 (August 19, 1992) (App. 91) 8, 10, 16, 17

H. Weiss, Report and Recommendations on Proposed Revisions of Regulations, Part 541 24-26 (USDOL1949) (App. 112) 3, 6

USDOL Letter Ruling for March 29, 1991 (Fair Labor Standards Handbook, pp. 301-302, App. III (Thompson Publishing Group, Inc. 8/91) (App. 115) 3, 7

Page

1966 U.S. Code & Admin. News 3002 ..... 8, 9

1974 U.S. Code & Admin. News 2811 ..... 8, 9

2A Sutherland Stat. Const. § 45.11, pp. 48-49 (5th ed. 1992 rev.) 14

2A Sutherland Stat. Const. § 45.12, pp. 61-63 (5th ed. 1992 rev.) 14

2B Sutherland Stat. Const. § 49.03, p. 7, § 49.04, p. 12 (5th ed. 1994 rev.) 14

2B Sutherland Stat. Const. § 49.05, pp. 21-22 (5th ed. 1994 rev.) 14

3 Sutherland Stat. Const. § 58.04, p. 79 (5th ed. 1992 rev.) 13

Bailyn, "Political and Social Structure in Virginia" Seventeenth Century America: Essays in Colonial History 102, 113 (J. Smith, ed. 1959) 21

E. Ferguson, The Power of the Purse: A History of American Public Finance, 1776-1790 (1961) 20, 23

L. Gipson, The Coming of the Revolution: 1763-1775 (1954) 23

Magers, "A Practical Guide to Federal Civilian Employee Disciplinary Actions," 27-100-77 Mil. L. Rev. 71 (1977) 17, 18

Nelson, "A Short, Ironic History of
American National Bureaucracy",
44 J. Politics 747, 750 (1982) 21

H. Osgood, The American Colonies in
the Eighteenth Century (1924) 21, 22, 23

T. Pownall, The Administration of
the Colonies (1764) in
2 The Annals of America 98, 102 (1968) 22

A. Schlesinger, Prelude to Independence (1958) 21

"The States and the Congress Move
Towards Independence",
6 Publius: A Journal of Federalism
135 (Winter 1976) 23

L. White, The Federalists:
A Study in Administrative History (1948) 23

Yarbrough, "Federalism in the Foundation
and Preservation of the American Republic,
6 Publius: A Journal of Federalism
43 (Spring 1976) 26

No.

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.

Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The State defendants respectfully request that a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit Court of Appeals which reversed a district court summary judgment in their favor.

OPINIONS BELOW

The opinion of the court of appeals is reported at 54 F.3d 438 (7th Cir. 1995), *rehearing and rehearing en banc denied*. It is reprinted at App. 1-8. The order denying rehearing is reprinted at App. 9-10. The opinion of the district court is reported at 858 F.Supp. 885 (W.D.Wis. 1994). It is reprinted at App. 11-41.

JURISDICTION

The decision issued May 15, 1995. A timely petition for rehearing was filed May 30, 1995. Rehearing was denied July 12, 1995. App. 1. This Petition is timely filed. Jurisdiction is invoked under 28 U.S.C. §§ 1251(b)(2) and 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Relevant parts of the applicable constitutional provisions, statutes and regulations, being lengthy, are set forth in the Appendix. App. 46-60. S.Ct. Rule 14.1(f). The constitutional provisions are: Article I, Section 8, clause 3 and Article IV, Section 4, of the United States Constitution; Article X and Article XIV, Section 1, of the Amendments to the United States Constitution. App. 46. The federal statutes are: 5 U.S.C. Part 3, Ch. 75 (1978); 5 U.S.C. Part 3, Ch. 75 (1978); 29 U.S.C. § 203; 29 U.S.C. § 207(a)(1); and 29 U.S.C. § 213(a). App. 46-52. The federal regulations are: 5 C.F.R. Part 551, Subpart B; 29 C.F.R. § 541.1; 29 U.S.C. § 541.2; 29 C.F.R. § 541.3; 29 C.F.R. § 541.5d (1991) and 29 C.F.R. § 541.5d (1992). App. 52-60. The Wisconsin Statutes are: §§ 15.001, 16.415, 16.53, 20.923, 111.90, 111.91, 230.01, 230.34, 230.44, Wis. Stats. App. 60-65.

Other material essential to understand the petition are in the Appendix. S.Ct. Rule 14.1(i)(vi). This includes: two non-regulatory federal agency interpretations -- 29

C.F.R. § 541.118 and 29 C.F.R. § 541.314 (App. 66-70), and relevant excerpts from the Federal Register (App. 70-112) and from a 1949 USDOL report on the salary basis test and a 1991 USDOL Letter Ruling (App. 112-117).

STATEMENT OF THE CASE

A. Statement of Facts.

The factual findings of the district court are undisputed. App. 14-18. Through winnowing of issues, only certain facts are now relevant. The engineers, categorized as exempt professionals under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (the FLSA), challenged that status through this lawsuit. For each week the engineers performed work, they were paid a predetermined amount exceeding $500.00. App. 14-15.

Based on a study showing Wisconsin lost skilled engineers to the higher-paying private sector, the engineers have, since 1973 -- before the FLSA was extended to Wisconsin -- received straight time overtime, beyond the predetermined amounts, for work beyond 40 hours a week. Straight time overtime is required by the collective bargaining agreement between Wisconsin and plaintiff State Engineering Association. App. 15.

The engineers must keep accurate records of the time they work to assure this overtime pay is correctly paid and because they work on projects funded by program revenue or federal money. Auditing requirements mandate time be documented and attendance of employes tracked. Wisconsin policy has long required all employees to account for any work absences unrelated to work. App. 15.

Wisconsin imposes uniform discipline on its employes. Differentiating discipline between employes because they are exempt or nonexempt would undermine the validity of the discipline, violate Wisconsin's labor

relations laws, create dissension and morale problems among its work force and violate its employees' state and federal constitutional rights. Wisconsin is obliged to establish fair and reasonable work rules for all employes and to establish and administer a fair and reasonable system of discipline for employees who violate work rules, state law or federal law. In determining discipline in each case, Wisconsin must impose discipline that is fair, proper for the circumstances, and not excessive. App. 16.

During the liability period, only plaintiff Terry Cook and class member David Russell had, or were facing, suspensions without pay for periods other than full workweeks when the district court issued its decision. App. 16 and 32. Plaintiff Cook was facing discipline for claiming sick leave for absences from work when his supervisors did not believe he was sick. During two pay periods, in which he worked no overtime, adjustments were made to his leave accounts for the periods he erroneously claimed sick leave and took no other form of personal leave. Depending on the outcome of a grievance pending when the district court granted summary judgment, he faced a potential suspension without pay as discipline for these improper claims of sick leave, an infraction not involving a safety rule. App. 16 and 32. During one pay period class member Russell received a disciplinary suspension of eight hours without pay for leaving a training session midway during the presentation and not returning to work. During another pay period, his salary was adjusted to account for the time when he was absent from the training session but did not take any form of personal leave. During these two pay periods, he worked no overtime. App. 16.

The district court found Congress could never have intended to apply any part of the salary basis test to public employers. App. 26-39. That application, the district court found, would have conflicted with the public accountability States owed to their citizens and constitutional limitations on congressional power. The district court further found

that accepted statutory construction indicia, including inconsistent positions by USDOL and a consistent rejection of the salary requirement by an agency administering the FLSA as to federal employes, argued against applying the test to public employers. App. 26-39.

The court of appeals found Wisconsin had forfeited the exemption as to all of the engineers simply by asserting it reserved the right to impose suspensions for periods other than for full workweeks for infractions other than safety rules of major significance. App. 5 and 8. *E.g.*, Bankston v. State of Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995). By extension, this forfeiture of exemptions applies to virtually all of Wisconsin's exempt employes. Even if none of the Engineers had been suspended without pay for other than full workweeks for non-safety rule infractions, the court of appeals would have made that finding. *Id.*

B. History of the FLSA, Exemptions, Salary Basis Requirement, Salary Basis Test and Disciplinary Deduction Standard.

Congress enacted the FLSA in 1938 requiring private sector employes be paid overtime compensation unless exempted by the statute. 29 U.S.C. § 207; Pub.L. 75-718, 52 Stat. 1060 (1938). Since enactment, 29 U.S.C. § 213(a)(1) has exempted executive, administrative and professional employes from those overtime mandates (the exemptions).

In 1966, the FLSA was extended to limited groups of public employers. Pub. L. 89-601, 80 Stat. 830. Until then, it applied only to private employers. In 1974, it was extended to nearly all public employers. Pub. L. 93-259, 88 Stat. 55. The Court held extensions of the FLSA to public employers constitutional (Maryland v. Wirtz, 392 U.S. 183 (1968)), then unconstitutional (National League of Cities v. Usery, 426 U.S. 833 (1976)), and then constitutional (Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528

(1985)) and addressed the extension of the FLSA to public employers one other time (Moreau v. Klevenhagen, 508 U.S. ___, 113 S.Ct. 1905 (1993). The Court has not analyzed how the exemptions apply to public employers. *Id.*

Legislative history confirms Congress intended that public employers not be required to pay overtime compensation to their executive, administrative and professional employes. *See* App. 24-25, 108. As the district court noted, Congress may have recognized requiring States to pay executives and professionals overtime compensation could exceed constitutional limits. App. 25 citing to Merritt, "The Guarantee Clause and State Autonomy: Federalism for a Third Decade", 88 Colum.L.Rev. 1, 56-57 (1988).

"Salary", as a criterion for the exemptions, has varied. For two years after enactment, USDOL required executives be paid a minimum amount, though not salary, and had no payment criteria for professionals. App. 70. In 1940, USDOL created a regulatory salary requirement. App. 56-59 (29 C.F.R. §§ 541.1, 541.2 and 541.3); App. 71-72. The articulated reasons for this requirement have been that employers in 1940 said it was easy to use and employers in 1949 said it was a "universal" way to pay exempt employes. App. 92, 112-15; Craig v. Far West Engineering Co., 265 F.2d 251, 259 n.11 (9th Cir. 1959); Brock v. Claridge Hotel and Casino, 846 F.2d 180, 185 (3rd Cir. 1988).

USDOL elaborated on the salary requirement through a non-regulatory interpretation called the "salary basis test". App. 66-69 (29 C.F.R. § 541.118 in 29 C.F.R. Part 541, Subpart B). *See also* App. 72-73, 75-76. That test contains a "disciplinary deduction" standard. 29 C.F.R. § 541.118(5). Under this standard, employers lose exemptions if they deduct pay, in increments less than full workweeks, for disciplinary reasons other than "safety violations of major significance". 29 C.F.R. § 541.118(5).

Though 29 C.F.R. § 541.118(5) seems to bar all non-safety rule disciplinary deductions regardless of length, full workweek non-safety deductions are allowed. 29 C.F.R. § 541.118(a) (employes need not be paid for a workweek in which no work performed); App. 66, 68, 115-17. For employes working five-day weeks, non-safety suspensions for three days, twelve days or twenty-four days would all be unacceptable. *Id.* USDOL also bars, regardless of work needs, suspending an employe as non-safety rule discipline for one or two days each week for several weeks. *Id.*

Before 1954, this standard varied. During and after World War II, companies could deduct pay for absenteeism without losing exemptions. App. 25, 113-14. A 1949 hearing report concluded that this absenteeism provision was "cumbersome" and rarely used, that discipline of exempt employes was itself rare and that the conditions justifying the provision were over. *Id.* Nonetheless, proposed amendments to the salary basis test based on the 1949 report would have allowed deductions for "major disciplinary reasons." App. 72-73. This was deleted from the final interpretation because of undisclosed "comments." App. 73. Since 1954 the disciplinary deduction standard has been unaltered and unexamined. App. 68, 73, 105-06.

Starting in 1974, the Civil Service Commission administered the FLSA as to most federal employers. App. 76-77. It developed instructions in 1974 and promulgated a regulation in 1975 which, "integrating exemption criteria with Federal classification systems to the extent possible", eliminated salary as a criterion and focused instead on duties. App. 76-82. The Commission, and its successor the Office of Personnel Management (the OPM), reaffirmed, in subsequent rulemaking, that eliminating salary as a criterion was more logical in the public sector. *E.g.*, App. 82-83, 85. It continues to exclude salary, and disciplinary deductions, as a criterion for determining exemption status. App. 52-56.

USDOL administered the FLSA as to State and local employers. Between the stay issued in 1974 (National League of Cities v. Brennan, 419 U.S. 1321, 1323 (1974)) and Garcia issuing in 1985, USDOL did not address how FLSA exemptions applied to public employers. In 1985, USDOL recognized problems between civil service systems and its exemption criteria and began considering whether its salary requirement should, as with federal employes, be abandoned. App. 83-85. All subsequent inquiries into the rationale of the salary requirement, the salary basis test and the disciplinary deduction standard have, in the intervening ten years, been deferred to "a later date" through citation to this separate ongoing reconsideration by USDOL. App. 85-86, 90, 95-96, 99, 102, 111.

In 1991 USDOL focused on conflicts between parts of the salary basis test and leave accounting systems maintained by public employers. App. 86-91. It did not question whether the disciplinary deduction standard in the test should apply to public employers. App. 60, 86-91. In 1992, USDOL, noting unsolicited receipt of comments on the disciplinary deduction standard, stated it was "not open for comment" and would be addressed "at a later date." App. 111. USDOL declined to alter the standard as to public employers. App. 110-111.

The concept of "salary" does not appear in the statute (29 U.S.C. § 213(a)(1)) or the legislative history of the 1966 and 1974 amendments. 1966 U.S. Code & Admin. News 3002; 1974 U.S. Code & Admin. News 2811. The decisions of this Court on the extension of the FLSA to public employers have mentioned neither the salary requirement, the salary basis test nor the disciplinary deduction standard. *See* Maryland, 392 U.S. at 185-205; National League, 426 U.S. at 833-881 (1976); Garcia, 469 U.S. at 528-589; Moreau, 123 L.Ed.2d at 590-97.

REASONS FOR GRANTING THE WRIT

Congress never intended to exercise its commerce power to require States to impose discipline on their employes contrary to public accountability standards.

A. **The court of appeals decision undermines the federal-state balance by presuming that an outdated agency interpretation expresses subsequent congressional intent.**

The decision by the court of appeals undermines the delicate balance between the federal and State sovereignties protected by a web of constitutional provisions. It permits the federal government to micromanage how States relate to their own employes. This is an area the Founders knew to be at the heart of sovereignty and public accountability -- the control of official misconduct through their pay. The decision presumes Congress intended to force States either to impose discipline not commensurate with the underlying official misconduct, and breach their duty of accountability to their own citizens, or to pay federally mandated overtime compensation to all of their executives and professionals.

This stunning result is not grounded on anything in the statute or the legislative history. 29 U.S.C. § 213(a)(1); 1966 U.S. Code & Admin. News 3002; 1974 U.S. Code & Admin. News 2811. All accepted statutory construction rules argue against it. Pp. 13-15 *infra*. The court of appeals defers to an outdated non-regulatory agency interpretation, as if it were a regulation rather than applying the proper standard of searching such interpretations for consistency and internal persuasiveness. Pp. 15-17 *infra*. While declaring any possible rationale for the disciplinary deduction standard "pretty feeble" as applied to public and private employers (App. 8), the court of appeals fails to recognize that USDOL, in its rulemaking and interpretative

roles, never articulated a rationale for it.[1] The decision ignores USDOL last reviewing the validity of the salary requirement, and its components, in 1954 and consigning further review, in 1985, to indefinite future study. App. 83-84, 85-86, 90, 95-96, 99, 102, 111.

It ignores that Congress created a disciplinary structure for federal employes antithetical to the disciplinary deduction standard. Pp. 17-18 *infra*. It ignores that the Civil Service Commission and the OPM, charged with applying the FLSA to most federal employers, consistently, by regulation, rejected USDOL's entire salary requirement as inconsistent with public employment. It ignores USDOL itself admitting, while rulemaking in 1992, that using its salary basis test against public employers had been contrary to the intent of Congress during the many years USDOL was charged with applying the FLSA to the public sector. App. 102, 104, 106-07, 108.

The court of appeals decision also creates an indirect conflict in the circuits. The Ninth Circuit Court of Appeals, based solely on the 1992 admissions by USDOL, concluded the salary basis test, as applied to public employers, was "invalid in its entirety" prior to 1991 because it was contrary to congressional intent. Service Employees Int'l Union, Local 102 v. County of San Diego, 35 F.3d 483, 489 (9th Cir.

---

[1]The only attempted articulation in USDOL's interpretive role was deleting a proposed allowance for deductions based on "major disciplinary reasons" in 1954 because of unspecified "comments". App. 72-73. In 1992, while belatedly trying to remedy how applying other parts of the salary basis test to the public sector defeats congressional intent, USDOL expressly refrained from analyzing whether the standard had any rationale. App. 110-111. Even returning to the 1949 Weiss Report, the only rationale is perceived administrative convenience and a rarity, amongst the private employers then covered, both in suspensions for non-safety reasons and in disciplining exempt employes at all. App. 112-115.

1994), *amended and superceded on denial of rehearing*, 60 F.3d 1346, 1353 (9th Cir. 1995). *See also* Stewart v. City and County of San Francisco, 834 F.Supp. 1233 (N.D.Cal. 1993). Though Service Employees was analyzed extensively in the briefs, the court of appeals does not cite it.[2]

The court of appeals decision defers to the USDOL interpretation even though it creates, rather than resolves, serious constitutional concerns. Pp. 18-29 *infra*. It dismisses those concerns without the respect they not only deserve, but command. Characterizing as "silly" the rights of State employes to Due Process under the Fourteenth Amendment to the United States Constitution, it discerns no difference between analyzing Congressional interference with disciplinary options of State employers rather than those of private employers. App. 7. *See* pp. 18-29 *infra*.

The court of appeals misfocuses its constitutional analysis by skeptically wondering why States can not follow USDOL's directions, It does not independently analyze whether the delicate and vital boundaries of dual

---

[2]Service Employees at 60 F.3d 1346 issued after the court of appeals, in Mueller, denied rehearing. Since the liability period in Service Employees ended in April 1991, the court was not asked to analyze applying 29 C.F.R. § 541.5d to any facts. 35 F.3d at 485, 60 F.3d at 1349. Applying the disciplinary deduction standard in the public sector was also not involved. *Id.* Service Employees, comparing USDOL's failure to consider public accountability requirements until September, 1991 with its efforts thereafter, ventured, in *dicta*, that the 1992 rule may have properly amended the salary basis test to take public accountability principles into account. 35 F.3d at 489, 60 F.3d at 1353. With Service Employees holding, however, that it was "entirely invalid" and contrary to congressional intent to apply any part of the pre-1992 salary basis test to public employers, and with Mueller holding that any part of that test left over after USDOL's 1992 rulemaking was presumed valid, there is at least an indirect conflict in the circuits.

sovereignties have been breached. Dismissing Guarantee Clause concerns, for example, the court improperly narrows its focus to observing the plaintiffs are "engineers", perhaps suggesting a State is not accountable to the public in employing engineers. App. 7. Regardless of the validity of this suggestion, the court of appeals fails to appreciate that, since Wisconsin maintains a "policy of imposing uniform discipline upon all employees" (App. 16), the court's ruling extends to **all** Wisconsin executive and professional employes except those few excluded from FLSA coverage by Congress under 29 U.S.C. § 203(2)(C) (App. 51) or from salary requirement coverage by USDOL interpretations under 29 U.S.C. § 541.314 (App. 70).[3] Unless Wisconsin surrenders to USDOL its uniform discipline policy covering all employes, it would lose all exemptions which, given these exclusions, would require that persons not appointed by elected officials (29 U.S.C. § 203(2)(C)), such as the President of the University of Wisconsin System and the Chancellors and Provosts of the various universities (§ 36.09, Wis. Stats.), would have to be paid federally-mandated overtime compensation. The faculty, being teachers, would not. 29 C.F.R. § 541.314. Vast Wisconsin taxpayer resources would have to be expended in back pay alone, as well as future overtime compensation, as to employes Congress never intended to cover.

The court of appeals properly recognizes "Americans are suspicious of their public servants", that they "demand "'public accountability' for every minute, or at least every hour" for which they are paid and that this principle "is deeply embedded in the American political culture." App. 6. It does not recognize the constitutional significance in the federal government forcing a State, as a wholesale

---

[3]Elected officials and certain of their appointees and advisors were excluded by 29 U.S.C. § 203(2)(C). App. 51. USDOL itself excepts attorneys, doctors and teachers from the salary requirement. 29 C.F.R. § 541.314. App. 70.

matter, to pay all of its employes overtime compensation merely because it reserves the right to impose disciplinary suspensions commensurate with infractions. Courts should not presume Congress intended to "require States to govern according to Congress' instructions." New York v. United States, 505 U.S. ___, 112 S.Ct. 2408, 2420 (1992).

If a public employer determines one of its law enforcement employes, violating work rules drafted to avoid corruption, breaches the public trust by accepting free food and if the proper sanction is less or more than a full workweek, the proper sanction should be imposed. Instead, State and local employers across the country are faced with the "Hobson's Choice" (App. 35, n.2) of toeing the line drawn by USDOL -- imposing discipline not commensurate with the misconduct -- or entirely losing their FLSA exemptions. *E.g.*, Bankston v. State of Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995). As will be seen, Congress could never have constitutionally intended such results. As will be noted first, Congress never did.

B. All accepted rules of statutory construction run against concluding that Congress intended to undermine the federal-state balance by applying the disciplinary deduction standard to public employers.

Statutes designed to safeguard public funds, such as Wisconsin statutes potentially threatened by USDOL's disciplinary deduction standard (*e.g.*, App. 60-65), are to be strictly construed in favor of that goal. 3 Sutherland Stat. Const. § 58.04, p. 79 (5th ed. 1992 rev.). Statutes in derogation of sovereignty, which this Court's decisions in Maryland, National League and Garcia plainly show is the critical question, are construed strictly against the individual and in favor of sovereignty. *Id.*

Which agency view of the salary requirement, and its offshoot, the disciplinary deduction standard, expresses

congressional intent: the view of the Civil Service Commission and OPM that no salary requirement applies to the public sector or the view of USDOL that it does? All accepted factors, such as pronouncements concurrent with congressional action and agency consistency, favor the view of the Civil Service Commission and OPM. 2B Sutherland Stat. Const. § 49.03, p. 7, § 49.04, p. 12 (5th ed. 1994 rev.).[4] USDOL's inaction does not trump any of those factors. "Administrative inaction" connotes no agency conclusion unless it clearly resulted from "carefully considered interpretation" rather than "inattention." 2B Sutherland Stat. Const. § 49.05, pp. 21-22 (5th ed. 1994 rev.) (emphasis added). USDOL never articulated a rationale for concluding that Congress intended the disciplinary deduction standard to apply to public employers. Its inaction can hardly be viewed as a "carefully considered interpretation."

Congress is presumed to have acted constitutionally and, where one construction involves serious constitutional difficulties, that interpretation should be rejected. 2A Sutherland Stat. Const. § 45.11, pp. 48-49 (5th ed. 1992 rev.). Even if the only construction which saves a statute from unconstitutionality is a strained one, accepting it is not only permitted but desirable. 2A Sutherland Stat. Const. § 45.11, p. 49 (5th ed. 1992 rev.). In choosing among competing interpretations, courts are not restricted to being concerned about constitutionality. 2A Sutherland Stat. Const. § 45.12, pp. 61-63 (5th ed. 1992 rev.). Courts also choose the most rational and sensible construction. *Id.* It requires no strain of statutory language to conclude Congress never intended,

---

[4]As an advocate, the United States Government, confronted with the USDOL salary standards by a litigant seeking overtime compensation, understood that very few federal employes are paid on a salaried basis and persuaded the court that "it was clearly not Congress' intention to include the entire Federal work force under the FLSA." Roney v. United States, 790 F. Supp. 23, 26 n.2 (D.D.C. 1992).

in the public sector, that salary be a criterion to obtain the exemptions, much less intended the disciplinary deduction standard to bind the hands of States. 29 U.S.C. § 213(a)(1). As will be seen, finding such intent creates serious constitutional concerns and must be rejected.

C. The decision undermines the federal-state balance by improperly deferring to a non-regulatory interpretation as if it were a regulation.

The decision incorrectly defers to the disciplinary deduction standard as if it were a "regulation" entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) and abdicates the judiciary's proper role by over-applying even that generous standard. App. 5-6. The proper standard was set forth in Skidmore v. Swift & Co., 323 U.S. 134 (1944). It held USDOL's non-regulatory interpretations of the FLSA assist in discovering Congressional intent only if they evidence thorough consideration and valid reasoning, are consistent with other agency pronouncements and present "all those factors which give it power to persuade." *Id.* at 140.

Skidmore persuasiveness standards -- not Chevron deference -- govern USDOL "interpretations" like the salary basis test.[5] Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1071-72 (1st Cir. 1995); Reich v. New York, 3 F.3d 581, 587 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 1187 (1994). The court of appeals, examining 29 C.F.R. § 541.118 as to private employers before Mueller, recognized that Skidmore standards apply to the salary basis test. Klein v.

---

[5]The Ninth Circuit, addressing whether Congress ever intended to apply the salary basis test to public employers, improperly applied Chevron deference and **still** concluded Congress never intended any such thing. Service Employees, 35 F.3d at 487-89, 60 F.3d at 1351.

Rush-Presbyterian-St. Lukes Medical Center, 990 F.2d 279, 283-84 (7th Cir. 1993); Tripp v. May, 189 F.2d 198, 201 (7th Cir. 1951). Unless the "grounding" of the non-regulatory interpretation is clear from examining the interpretation itself, it receives no weight. John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank, 114 S.Ct. 517, 529 (1993). *See also id.* at 529-31 n.5 (Thomas, O'Connor and Kennedy, JJ., dissenting) (recognizing Chevron deference unavailable to non-regulatory interpretations).

The disciplinary deduction portion of the salary basis test can not survive Skidmore analysis. The standard conveys no inherent persuasiveness since USDOL has never, in its rulemaking or interpretative roles, articulated a rationale for the standard. Viewed as part of the salary basis test, the standard is actually inherently illogical. Part of that test allows an employer to deduct a day's pay when an employe is absent for a day to handle "personal affairs" such as, for example, the funeral of a parent. 29 C.F.R. § 541.118(2). If that employe lied about the funeral to attend a ballgame, the same employer would entirely forfeit that exemption by suspending the employe without pay for a day as discipline. 29 C.F.R. § 541.118(5). The failure by USDOL to discharge its duties, by long ago eliminating the disciplinary deduction standard, "'should not be permitted to stand in the way of a correct administration of the law." John Hancock, 114 S.Ct. at 529.

Even where a USDOL interpretation is entitled to Chevron deference, it is rejected where USDOL impedes on territory properly lying with the courts for resolution. Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990) ("refusing to sanction '"unauthorized assumption by [USDOL] of major policy decisions"'" and noting "'an agency may not bootstrap itself into an area in which it has no jurisdiction'"). USDOL's 1992 rulemaking commentary clarifies it tried to preserve pieces of its salary basis test as applied to the public sector by making major policy decisions beyond its authority to make. In doing so, it also

assumed the judiciary's mantle of evaluating where the boundaries lie between a State's public accountability duties and Congress's commerce powers. App. 91-112. USDOL can not usurp the roles of either Congress or the courts.

D. Congressional intent toward disciplining public employes appears from how it treats federal employes.

Federal employers may suspend employes without any regard to restrictions involving either "full workweeks" or "safety rules of major significance". App. 46-50. During the same time period it extended the FLSA to public employers, Congress enacted statutes authorizing all varieties of official misconduct to be addressed by a wide range of suspensions. App. 46-51. Congress would not have created a detailed structure assuring suspensions of federal employes were rational and tied to the underlying misconduct while, at the same time, preventing States from doing the same. App. 46-51.[6] *See* App. 73 and 82.

On September 6, 1966, three weeks before extending the FLSA to some federal employers, Congress expressly allowed all federal employes in the competitive service to be suspended without pay based on "such cause as will promote the efficiency of the service." App. 47. The time periods it authorized were wholly unconnected with USDOL's "full workweek" standard. App. 46-51. The resultant Civil Service Commission rules on suspensions were recognized as important means of being "certain that

---

[6]The court of appeals also ignored an extensive presentation in an *amicus curiae* brief filed by the State of Washington, concurred in by the National League of Cities, showing that nearly all States and countless local governments expressly provide by statute or ordinance for suspensions without pay for less than full workweeks based on infractions other than safety rules. State of Washington brief, pp. 9-11, nn. 6 & 7.

the proposed [disciplinary] action is appropriate." Magers, "A Practical Guide to Federal Civilian Employee Disciplinary Actions," 27-100-77 Mil. L. Rev. 71 (1977). Not only are suspensions authorized for infractions far beyond "safety violation, Congress, in amending this statute in 1978, expressly allowed suspensions for anywhere from one to fourteen days based on repeated "discourteous" behavior towards the public. App. 47. The courts, implementing Congress' clear intent, routinely examine if the discipline imposed on federal employes is commensurate with the misconduct. *E.g.* Gellerman v. Nimmo, 704 F.2d 1004, 1006 (7th Cir. 1983); Pascal v. United States, 543 F.2d 1284, 1289-90 (Ct. Claims 1976) (penalty not too severe); Crowley v. United States, 527 F.2d 1176, 1191 (Ct. Claims 1975).

Congress has likely known how the public sector employes it interacts with, federal employes, were treated under the FLSA and under the discipline structure Congress created. There is no evidence Congress ever intended the result produced by the court of appeals decision: that States are prohibited for suspending their employes with the same public accountability that Congress recognizes it owes its citizens. The court of appeals does not mention the federal disciplinary structure in discerning Congressional intent to impose a vastly different one on the States.

E. The disciplinary deduction standard undermines the federal-state balance by depriving States of the vital tool of progressive discipline in ways that implicate constitutional rights.

Suspensions without pay are ordinarily imposed as part of "progressive discipline" which seeks to correct misconduct, rather than punish, by rationally assessing discipline appropriate to both the severity of the misconduct and the prior disciplinary history. *See, e.g.*, NLRB v. Chicago Typographical Union No. 16, Communications Workers of America, AFL-CIO, 974 F.2d 933, 938 (7th Cir.

1992); Warren v. Stone, 958 F.2d 1419, 1421 (7th Cir. 1992); Tennes v. Dep't of Revenue, 944 F.2d 372, 379 (7th Cir. 1991); Fleming v. County of Kane, 898 F.2d 553, 555 (7th Cir. 1990). Public employers are subject to the Due Process and Equal Protection Clauses in many transactions with their employes. The existence of progressive discipline policies is often a significant factor in evaluating constitutional challenges to disciplinary steps taken by public employers. *See, e.g.*, Glass v. Dachel, 2 F.3d 733, 737 (7th Cir. 1993); Black v. Barnett, 999 F.2d 1295, 1296 (7th Cir. 1993); Warren, 958 F.2d at 1421; Fleming, 898 F.2d at 555; Lee v. County of Cook, 862 F.2d 139, 141 (7th Cir. 1988). *See also* Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979).

Equal protection violations are shown through proof of "intentional discrimination against [the plaintiff] because of [the plaintiff's] membership in a particular class." Personnel Administrator v. Feeney, 442 U.S. at 279. Categorization of employes as exempt or non-exempt for FLSA purposes may not furnish a rational basis for differential discipline responsive to the same conduct by otherwise similarly situated employes -- particularly where a State's policy calls for progressive discipline and for tying discipline to the misconduct. If differently treated exempt and non-exempt employes also happen to differ by sex or race, the State's rationale would be subjected to strict scrutiny and distinctions even harder to justify.

Congress could not have intended, by extending the FLSA to all public employers, to create substantial disparities in the discipline imposed upon public employes based on their membership in the classes of being either "exempt" or "non-exempt" under the FLSA. Assume two State employes possess similar employment profiles. Each engages in misconduct sufficiently similar that any reasonable employer would impose a two-day suspension without pay on each employe. If the State employer is precluded from imposing suspensions on one employe only because that employe is exempt, the State employer is left

with the options of either a reprimand or a more severe suspension. If the exempt employe is reprimanded while the non-exempt employe is given a two-day suspension, the equal protection rights of the non-exempt employe may be implicated. By contrast, if the exempt employe is given a five-day suspension while the non-exempt employe is just given a two-day suspension, the equal protection rights of the exempt employe may be implicated.

For Congress to require States to impose discipline other than what is proper would disrupt more than the federal-State balance. The balance between the State government and its citizens could be disrupted as citizens learn of, and react to, discipline not commensurate with the misconduct. The balance between the State government and its employes, on which the concept of progressive discipline relies, would be disrupted as well. If an employer responds too leniently to misconduct, the employe may be lulled into future misconduct. If an employer responds too harshly, the relationship may be ruptured. The disciplinary deduction standard does more than destroy progressive discipline by depriving public employers of a particular disciplinary tool in their "arsenals of disciplinary remedies" (App. 7) which they should not have to surrender. More importantly, it distorts and vitiates the vital corrective messages which wayward employes must receive in the right dose in order to return to proper public service.

F. The power to control official misconduct through pay is a vital component of sovereignty.

The Founders knew the ability of governments to impose monetary sanctions on their employes for misconduct was central to both being accountable to their citizens and meaningful governmental entities. *E.g.*, E. Ferguson, The Power of the Purse: A History of American Public Finance, 1776-1790 xiv-xv (1961). "The power of the purse was to them the determinant of sovereignty". *Id.*

The Revolution was largely a struggle over central or local control of public officials. *E.g.*, Nelson, "A Short, Ironic History of American National Bureaucracy", 44 J. Politics 747, 750 (1982). The "country was conceived as much in anger as in liberty" over Britain's appointed officials serving "'at colonial expense.'" *Id.* The Declaration of Independence charged the King "'sent hither swarms of officers to harass our people and eat out their subsistence'"). *Id.*; A. Schlesinger, Prelude to Independence 12-13 (1958); Freytag v. C.I.R., 501 U.S. 868, 905, n. 4 (O'Connor, J, concurring).

By the mid-1600's "the distinction between local and central authority became clear" and colonial leaders battled "with every weapon" to reduce the power of royal officers. Bailyn, "Political and Social Structure in Virginia" Seventeenth Century America: Essays in Colonial History 102, 113 (J. Smith, ed. 1959). During the 1700's, colonists understood that, absent appointive authority, controlling an official's pay effectively governed the official. Britain, requiring the colonies to pay the officers it appointed, strived to also require the colonies to pay fixed amounts. *E.g.*, 1 H. Osgood, The American Colonies in the Eighteenth Century 155-56 (1924); 3 Osgood at 323-24. The locally-elected assemblies instead assumed authority over the officials by controlling when and how much they were paid. *Id.* 1 Osgood at 155-56; 3 Osgood at 323-24; 4 Osgood at 128.

The assemblies developed three vital means to control royal officials: (a) ignoring fixed amounts required by Britain and deciding for themselves how much to pay; (b) evaluating proper amounts **after** services were rendered; and (c) suspending or reducing pay in response to perceived misconduct. 2 Osgood at 132; 3 Osgood at 322; 4 Osgood at 53. Assemblies strenuously asserted, for decades before the Revolution, that the amount and timing of those payments were assembly decisions. 1 Osgood at 155-56; 2 Osgood at 132-34, 136, 138; 3 Osgood at 215, 313, 322, 558-59; 4 Osgood at 12, 20, 53, 123-24, 128, 230. Assembly members who

challenged assembly efforts to control payments to officials were themselves disciplined. 2 Osgood at 100.

Displeased with the Pennsylvania Governor, its assembly "stopped" his salary until he complied with its directions. 4 Osgood at 60, 66. The New York assembly, upset with a chief justice, "reduced" his salary. 2 Osgood at 426-27, 429-30. The Governor resisted but finally agreed with this reduction. *Id.* The New York assembly reduced the pay of other officials for similar reasons. *Id.* at 430.

Colonists were familiar with actual suspensions effected by Governors holding disciplinary power. Two North Carolina council members were suspended for misuse of public funds. 4 Osgood at 211. Five New York council members were suspended for corruption. 1 Osgood at 273. A Virginia deputy auditor was suspended for dragging his feet in keeping account books. 2 Osgood at 242. Assemblies also asked Governors to suspend officials. 2 Osgood at 56.

The power assemblies assumed over payments to officials was perceived as highly inappropriate by advocates of strong centralized government. A former governor complained to Britain that assemblies having "withheld or reduced [an official's pay] on occasions where they have had reason to disapprove...[of] his conduct" had rendered the "officers of the Crown dependent on and governed by the assemblies." T. Pownall, The Administration of the Colonies (1764) in 2 The Annals of America 98, 102 (1968). Former Governor Pownall objected to the diminution of the central government while acknowledging the rationale behind assembly control over pay issues was to "prevent the misapplications of public money." *Id.* Other governors complained the power to discipline officers had, by these methods, been usurped by the assemblies. 4 Osgood at 143.

In reaction, Britain, through the Townshend Acts, imposed taxes "to support the governors and judges in those

colonies where assemblies wielded their power to withhold salaries as a club over royal officials." L. Gipson, The Coming of the Revolution: 1763-1775 174-75 (1954). The Revolution nearly began then with Samuel Adams asserting the battlecry of "taxation without representation" and claiming that removing pay decisions from the colonies would violate the British Constitution. *Id.* at 185-86. By backing away from this part of the Townshend Acts, Britain delayed the outbreak of war for several years. *Id.* at 186-95.

Suspending pay of officials was recognized by the Founders as a good tool to control misconduct. In the 1790's postal carriers had pay deducted for late deliveries and tax commissioners were fined for missing meetings. L. White, The Federalists: A Study in Administrative History 184, 426 (1948). Both in colonial and later times, progressive discipline was used. *Id.* at 425-26; 2 Osgood at 122.

The colonies had developed governmental skills it took the fledgling federal government decades to develop. Ferguson, at 48-49, 50-51, 52-53, 100-101; Gipson at 27 (as of 1763, "the ability of the colonists to manage their own governmental affairs with competence and economy is indicated on every hand by a study of local and provincial records"). They sought to retain that ability by authorizing Congress to declare independence while expressly reserving the regulation of internal concerns. *E.g.* "The States and the Congress Move Towards Independence," 6 Publius 135, 139, 142 (Winter 1976). The States came into the union prepared to discipline their own officials in accordance with principles of public accountability. The Founders would have considered it inconceivable to construe the commerce power as allowing Congress -- much less a federal agency -- to usurp that vital indicia of sovereignty from the States.

G. Had Congress intended the disciplinary deduction standard to apply to State employers it would have exceeded its constitutional boundaries.

The interactions between the internal constraints of the Commerce Clause, Congress's affirmative duties under the Guarantee Clause and the protections of Tenth Amendment must be considered in determining whether Congress could have intended to prohibit States from suspending their employes in the same manner Congress authorized federal agencies to do. U.S.Const., Art. I, § 8, cl. 3, Art. IV, § 4 and Amend. X. Had Congress intended such a thing, it would plainly have overstepped its authority.

The disciplinary deduction standard -- an offshoot of the salary requirement -- cannot coexist with the public accountability which Wisconsin and other public entities owe to their constituents as sovereigns under the Constitution. The Civil Service Commission and OPM long recognized the conflict by abandoning the salary requirement. The court of appeals admitted it is a deeply embedded principle in American culture that the taxpayers demand accountability from all public servants (App. 6) yet presumed Congress would usurp the ability of States to be accountable as to a central issue, local control of official misconduct, that made the colonists and the Founders rebel.

The court of appeals improperly focuses on its own inability to perceive why States do not surrender, to the will of USDOL, their ability to determine how and whether to discipline their own employes. The correct focus is that the web of constitutional provisions implicated preclude Congress, not to mention USDOL acting as a legislator, from forcing States to surrender a power States reserved through the Tenth Amendment and which Congress must affirmatively protect through the Guarantee Clause. Once it is assumed that a federal agency, through non-regulatory

interpretations of a Congressional exercise of the commerce power, can force a State to discipline its employes in ways disconnected to the underlying misconduct, the surrender is complete. States could thereafter maintain their disciplinary structures, and other tools for assuring public accountability, only at the pleasure of those federal agencies.

The Commerce Clause (U.S.Const., Art. I, § 8) is the only constitutional ground for extending the FLSA to the States. Garcia, 469 U.S. at 530. On the "unsteady path" this Court has traveled in examining constitutional challenges to this extension, the Court has been directed to the Tenth Amendment (U.S.Const., Amend X). New York, 112 S.Ct. at 2420. The limitations which Congress' affirmative duties under the Guarantee Clause (U.S.Const., Art. IV, § 4) place on how the FLSA applies to the States have not been examined. As will be seen shortly, they are considerable.

Garcia held that detecting the line between mandates to States permissible under the commerce clause and impermissible under the Tenth Amendment should be left to the political process. 469 U.S. at 553-54. The Court has since recognized the Tenth Amendment, a restraint upon Congress' power, can not properly be left to Congress to enforce. *See, e.g.*, New York, 112 S.Ct. at 2420, 2423-25; Gregory v. Ashcroft, 501 U.S. ___, 111 S.Ct. 2395, 2398-2402 (1991); U.S. Term Limits v. Thornton, 514 U.S. ___, 115 S.Ct. 1842, 1852-60 and 1872-75 (Kennedy, J., concurring) (1995).

The Court also recently reaffirmed the Tenth Amendment does impose genuine limits on the scope of the commerce clause. United States v. Lopez, 514 U.S. ___, 115 S.Ct. 1624 (1995). Part of the restraint the Tenth Amendment telegraphs to Congress and the courts is that the "accountability of...state...officials [must] not be diminished." New York, 112 S.Ct. at 2424. Where a State is forced to take action because Congress has overreached, the accountability of both the State and federal governments are diminished because the anger with which citizens might

respond would be misdirected. *Id.* In that sense, to the extent the federal government forces States to impose discipline on their own employes not commensurate with the misconduct, adverse citizen reaction will not likely be directed towards the instigator, the federal government. If a State loses litigation challenging disparate treatment caused by federal restraints on the State's disciplinary process, adverse citizen reaction will likely focus on the State, not the federal, government.

Principles of federalism are abridged where the federal government micromanages how public employers exercise their powers to discipline employes. Rizzo v. Goode, 423 U.S. 362, 367 (1976). A major reason the Founders created dual sovereignties was to increase the motivation of officials to perform well for the public through competing healthy governments. Yarbrough, "Federalism in the Foundation and Preservation of the American Republic", 6 Publius 43, 55 (1976). With the federal government telling States, through the court of appeals decision, not to impose proper discipline, the assault on federalism here is more direct than most. Lopez holds the Commerce power may not be used to "'effectually obliterate the difference between what is national . . . and local and create a centralized government,'" that the Court's decisions on Congress's extension of the FLSA to public employers themselves warned of limits to the Commerce power and that defining those limits is "'necessarily one of degree.'" 115 S.Ct. at 1629 and 1633. Based on the interplay between the Commerce Clause and the Tenth Amendment alone, applying the standard to the States is suspect.

More than the Tenth Amendment is implicated. Congress has an affirmative duty, under the Guarantee Clause, to assure States have republican forms of government (U.S.Const. Art. IV, § 4). *E.g.*, Highland Farm Dairy v. Agnew, 300 U.S. 608, 612 (1937). New York reiterated the confines the Guarantee Clause imposes on Congress's mandates on state government while noting

Congress had not exceeded those confines there because it merely provided monetary incentives to the States, rather than mandates which would impinge on the Guarantee Clause. New York, 112 S.Ct. at 2432-33. The "Hobson's choice" presented to the States here is hardly an incentive.

A brief word about the "nonjusticiability" of the Guarantee Clause is in order. Though the Court has hesitated to referee internal political disputes between warring factions within a State, the Guarantee Clause has the added purpose of preventing Congress from impeding the ability of States to maintain their own chosen "republican forms of government" and, in that area, courts are the proper arbiters of where federal authority stops and State authority begins. *Id.* Examining those limits in a Guarantee Clause rather than Tenth Amendment context alters the analysis. Unlike the passive restraints conveyed by the Tenth Amendment, the Guarantee Clause imposes an affirmative constitutional duty on Congress. While the Court has perceived restraints yielding to a power (*E.g.*, Garcia), an affirmative duty should not so readily yield to a power. Doubts should favor the duty being served rather than the outer contours of the power being expanded.

In any event, the Court would not be not required to find Congress violated the Guarantee Clause. It would simply determine whether Congress intended to do so. Justice may be blind. Judges need not, and should not, be. The district court merely noted, applying accepted principles of statutory construction, that Congress could not have intended to violate the Guarantee Clause in extending the FLSA to State employers. Determining intent is not deciding internal political questions. *E.g.*, Minor v. Happersett, 88 U.S. 162, 175-76 (1875).

What effect does the web of constitutional provisions protecting a State's exercise of its public accountability duty from interference have on how the disciplinary deduction standard affects Wisconsin as an employer? It is direct and

clear. Wisconsin accounts to its citizens through a statutory structure which would be rendered toothless by the court of appeals decision. It grounds its organizational structure on the Guarantee Clause. App. 60-61 (§ 15.001(1), Wis. Stats.). It declares its executive branch must be operated efficiently to use tax dollars effectively. App. 61 (Sec. 15.001(2), Wis. Stats.). Fiscal officials, at their own peril and subject to audit, verify employes are being properly paid according to the law. App. 61-62 (§§ 16.415 and 16.53, Wis. Stats.). Wisconsin allows taxpayers to seek recovery of improper payments in recognition that the government, and each of its employes, works for the people. App. 61-62 (§ 16.415(3), Wis. Stats.) It maintains a detailed salary structures, expressly excluding overtime compensation, for its executives. App. 63 (§ 20.923, Wis. Stats.) To assure suspensions without pay are corrective rather than punitive, and return wayward employes to efficiently serving the public service, those suspensions must be based on "just cause." App. 65 (§§ 230.34 and 230.44, Wis. Stats.). This fulfills many policies, including "fair treatment based on the value of each employe's services." App. 64 (§ 230.01, Wis. Stats.). To protect the integrity of the disciplinary process, it is expressly excluded as a collective bargaining issue. App. 63-64 (§§ 111.90 and 111.91, Wis. Stats.).

Wisconsin has developed the means to account to its citizens. The court of appeals decision would take those means away. The boundaries of the Commerce power stop where a State's ability to account to its citizens, which Congress must affirmatively preserve under the Guarantee Clause and not invade under the Tenth Amendment, is curtailed. The court of appeals should first have determined the USDOL standard "does not raise serious constitutional concerns." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Tr. Coun., 485 U.S. 568, 577 (1988). The decision actually **creates** serious constitutional concerns by forfeiting the judicial role of interpreting the Constitution to a federal agency which had consciously kept its head in the sand. Without an "'affirmative intention of the Congress clearly

expressed'" requiring adoption of an interpretation fraught with unconstitutional implications, courts are, for that reason alone, to reject it as presumptively contrary to Congressional intent. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979). The court of appeals instead presumes, without evidence, Congress intended an interpretation fraught with unconstitutional implications.

CONCLUSION

Public employers must be able to appropriately respond to misconduct by their employes. "The danger to liberty, the danger of mal-administration, has not yet been found to lie so much in the faculty of introducing improper persons into office as in the difficulty of displacing those who are unworthy of public trust." James Madison, 1 Annals of Congress 496 (J.Gales ed. 1789). The court of appeals, without any indicia of legislative intent, presumed Congress intended to drive States towards those dangers and deprive Wisconsin and all other State and local employers of the ability to be accountable to their own citizens. A writ of certiorari should be granted.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
State Bar No. 1017190

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796